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Germany's Facebook Decision Likely Won't Be Influential

By **Sean-Paul Brankin and Evi Mattioli** (March 11, 2019, 4:17 PM EDT)

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On Feb. 7, 2019, the German Federal Cartel Office found Facebook Inc. guilty of abuse of dominance in relation to the collection of data from individual users.

The decision has rightly attracted substantial attention. It is another in a growing line of decisions by antitrust authorities in Europe against U.S. tech giants and internet platforms.[1] It marks the first time a competition authority ruled on a privacy-related abuse of dominance. It involves the collection and management of big data: Indeed, the FCO has billed it as "above all a so-called exploitative abuse," but exploitation via data extraction rather than excessive pricing.[2] And, although no fine was imposed, the remedies are likely to prove burdensome to Facebook.

Naturally enough, one significant focus of comment has been whether the case might act as a model for enforcement in other jurisdictions outside Germany.[3] It is difficult to be certain, not least because to date the FCO has not published its full reasoning (only a summary decision is currently available).[4] However, all the indications seem to be that this decision does not set a precedent that others are likely to follow. As set out below, it is based on specific German case law and reasoning that seems questionable from an antitrust policy perspective.

The Infringing Behavior

In order to create a Facebook account, users were required to agree to Facebook's terms of service, which set out Facebook's personal data collection and processing policies. Under these, Facebook aggregated data not only in relation to the user's activity on Facebook.com, but also from a variety of other sources, including:

- Facebook-owned services, such as Instagram and WhatsApp;
- Third-party websites that contain a Facebook plugin such as a "like" or "share" button (irrespective of whether the user clicks on the button); and

- Other third-party websites that carry no reference to Facebook but make use of Facebook Business Tools such as Facebook Analytics.

All of this data would be merged with data from the user's Facebook account, even if the user had blocked web tracking in their browser or device settings. It is this processing of data from sources other than Facebook.com to which the FCO objects.[5]

The Relevant German Law

The FCO's decision is based on Section 19(1) of the German Competition Act. Specifically, the FCO relies on the rulings of the German Federal Court of Justice in the VBL-Gegenwert and Pechstein cases.[6] According to the VBL-Gegenwert cases, civil law principles can be applied to determine whether exploitative business terms constitute an abuse for Section 19(1) purposes. This is the case where the terms are a manifestation of market dominance or superior market power. The FCO takes the view that any legal principle that aims to protect a contact party in an "imbalanced" negotiating position, including data protection law, can be applied for this purpose. Pechstein provides that if the behavior of a dominant company impacts on the constitutional rights of its contracting partners, the law must intervene to protect those rights.

Dominance

The FCO found Facebook dominant on a separate German market for private social networks, which included only Facebook and a small number of German language social networks (Google Plus having announced its intention to exit the German market).[7]

Services like LinkedIn were excluded from this market definition on the basis that they served a professional, rather than social, function. Services like YouTube, Snapchat and Twitter, which the FCO conceded might have some overlap with Facebook in terms of functionalities, were found to be insufficiently comparable and had not shown sufficient flexibility in adapting their product offer.

Within that narrowly defined market, Facebook had a market share of 95 percent in 2018 with 32 million monthly active users and 23 million daily active users.[8] The FCO considered the number of daily active users to be the key indicator. The FCO also referred to the strong direct and indirect network effects and barriers to switching as key elements in its assessment of dominance. Indeed, the FCO identified the market as one prone to tipping to a single monopoly provider.[9]

Abuse

In accordance with the VBL-Gegenwert case law, the FCO adopted a two-step analysis of abuse. The first was to examine whether its data policy was compatible with European data protection rules under the EU's General Data Protection Regulation. In the FCO's view, Facebook's collection and use of data from websites other than Facebook.com violated GDPR rules because, among others:

- Facebook had no "effective" consent to collect such data for the purposes of Art. 6(1a) GDPR; and

- Facebook could not argue that it was required to collect such data in order to fulfill its contract with the user to provide social networking services pursuant to Art. 6(1b) GDPR.[10]

User's consent was not "effective" for GDPR purposes because it was required as a prerequisite for access to the Facebook.com service. The FCO also considered it relevant in this context that, as a dominant company, Facebook had bargaining power over its users.
Finally, the FCO considered whether Art 6(1f) GDPR could permit Facebook's data processing activities on the basis that Facebook's interests outweighed private users' right to self-determination. It concluded this was not the case.

The second step in the FCO's analysis was to examine whether the violation of GDPR rules could be said to be a manifestation of Facebook's market power. It was sufficient for there to be some causal link between the abuse and Facebook's dominance. It was not necessary to show either that Facebook's conduct was only possible because of its dominance or that other market participants were unable to behave in a similar way.[11]

The FCO identified two such links. First, that Facebook's dominance left consumers with little choice but to accept its unlawful terms and conditions, creating an "unbalanced negotiation" with Facebook having "bargaining power over its users."[12] Second, Facebook had gained a competitive edge over other providers of social networks by gaining unlawful access to additional data sources.[13] Given the data-driven business model of social media apps, the combination by Facebook of data sets from its different social media apps and the collection and use of data originating from third-party websites has contributed to strengthening Facebook's market power.

The Remedy

The FCO decision requires Facebook (1) to allow users access to its social networking services without consenting to the collection of data from other sources and/or the linkage of that data to a user's Facebook account and (2) not to engage in such collection or linkage without specific consent. These obligations apply to all private Facebook users in Germany.

Comment and Analysis

As the above summary makes clear, the FCO's analysis turns crucially on the case law of the German courts. In particular case law allowing a finding of abuse to be based on a violation of other, nonantitrust civil law rules (in this case GDPR rules). That alone seems likely to make this a difficult precedent to follow in other jurisdictions. Indeed, the FCO appears to acknowledge as much. In the FAQ document it released with its summary decision, the FCO states that it did not pursue the case based on the EU prohibition on abuse of dominance in Article 102 of the Treaty on the Functioning of the European Union because "only the case-law of the highest German court has been established which can take into account constitutional or other legal principles (in this case data protection) in assessing abusive practices of a dominant company."[14]

While it is true that the German case law in principle required the FCO to establish some link between the infringement of civil law and Facebook's dominance, any such link would appear tenuous. As mentioned, the FCO expressly states that it was not required to establish either that Facebook's conduct was only possible because of its dominance or that other market participants were unable to behave in a similar way.

As to the two links on which the FCO relies, both appear questionable. The first, that Facebook's dominance left consumers with little choice but to accept its unlawful terms and conditions, is difficult to reconcile with the FCO's repeated assertions that users were unaware of Facebook's data collection.

For example, in a background paper released in 2017 the FCO stated: “Facebook’s users are oblivious as to which data from which sources are being merged to develop a detailed profile of them and their online activities.”[15]
This would be consistent with findings published by the European Commission on privacy provisions, which found that “nobody reads privacy notices.”[16] If so, users’ agreement to Facebook’s data collection terms could more accurately be attributed to consumer apathy, or perhaps their being insufficiently informed, than to Facebook’s dominant position. Indeed, it seems likely that any other service provider, dominant or not, could have achieved the same result. This would suggest that the issue is more properly addressed under consumer protection rules (like perhaps the GDPR rules themselves) than under antitrust provisions.

The second link to Facebook’s dominance relied on by the FCO — that Facebook’s unlawful behavior gave it a competitive advantage and raised barriers to entry — is equally difficult to accept. Facebook’s data practices only became unlawful with the entry into force of the GDPR in May 2018. Figures from Statista indicate that Facebook has had in excess of 30 million monthly active users in Germany since at least 2015, suggesting that it became dominant long before its actions became unlawful.[17] Nor do Facebook’s data processing practices seem likely to materially increase barriers to entry in the context of a market that the FCO itself identifies as likely to tip to monopoly.

In the U.S., a similar theory would be even less likely to support an antitrust claim, absent harm to competition. As Assistant Attorney General Makan Delrahim recently noted in a speech on platform antitrust enforcement: “Concerns over privacy, inadequate notice, unauthorized use of data, and data protection, are legitimate policy issues that need to be discussed, but should not lead to distortions of our antitrust standards to address them.”[18] To the extent the FCO theory concedes that competing service providers could have achieved the same results as Facebook, competition is not materially changed.

Facebook has announced its intention to appeal the FCO’s decision. Whether or not that appeal is successful, for the reasons set out above, it seems unlikely that other antitrust authorities will be swift to adopt the decision as a template for further cases.

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[1] See, e.g., the European Commission’s fines on Google (Cases 39740 Google Search (Shopping); and 40099 Google Android) and its ongoing investigation of Amazon (Bloomberg, Amazon Probed by EU on Data Collection From Rival Retailers, 19 September 2018).

[2] Bundeskartellamt, Press Release, 7 February 2019, Bundeskartellamt prohibits Facebook from combining user data from different sources, at p. 3. (Note that, as set out below, the case is not however based on a purely exploitative abuse as the FCO also relies on the exclusionary effect of

Facebook's behaviour, which it finds gave it a competitive edge over competing providers strengthening its dominant position.)

[3] See, e.g., https://www.law360.com/competition/articles/1127112/facebook-ruling-gives-antitrust-weight-to-data-privacy

[4] Bundeskartellamt, Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, B6-22/16, 15 February 2019 (the "FCO Case Summary").

[5] FCO Case Summary, p. 1.

[6] FCO Case Summary, p. 8.

[7] FCO Case Summary, p. 3.

[8] FCO Case Summary, pp. 2 and 6.

[9] FCO Case Summary, p. 6.

[10] Significantly, the FCO did not pursue Facebook in relation to the collection and processing of user data generated on Facebook.com, conceding that "an advertising-funded social network generally needs to process a large amount of personal data" (FCO Case Summary, p. 1.) The point here would appear to be that the FCO concedes that the requirements of Art. 6(1b) GDPR and/or Art 6(1f) GDPR were met in relation to such data. This emphasizes the fact that the finding of abuse is based critically on the infringement of GDPR rules.

[11] FCO Case Summary, p. 11.

[12] FCO Case Summary, p. 11.

[13] FCO Case Summary, p. 11.

[14] Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources, Background information on the Bundeskartellamt's Facebook proceeding, 7 February 2019, p. 6.

[15] Bundeskartellamt, Background information on the Facebook proceeding, 19 December 2017. See also Bundeskartellampt, Press Release, Bundeskartellamt prohibits Facebook from combining user data from different sources, 7 February 2019 ("However, this is what many users are not aware of: Among other conditions, private use of the network is subject to Facebook being able to collect an almost unlimited amount of any type of user data from third party sources, allocate these to the users' Facebook accounts and use them for numerous data processing processes.")

[16] European Commission, JRC Science and Policy Report, Nudges to Privacy Behaviour: Exploring an Alternative Approach to Privacy Notices, Report EUR 27384 EN, 2015, at p. 6.

[17] Forecast of Facebook user numbers in Germany from 2015 to 2022 (in million users), Statista, 2019.

[18] "'I'm Free': Platforms and Antitrust Enforcement in the Zero-Price Economy," Keynote Address by

Assistant Attorney General Makan Delrahim, Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School, available online

at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons (February 11, 2019).